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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NORIEGA CHIROPRACTIC, INC., etc.,

Plaintiff and Appellant,

v.

LIZA RITA NALIO,

Defendant and Respondent.

B165535

(Los Angeles County
Super. Ct. No. BC271709)

APPEAL from an order of the Superior Court of Los Angeles County. John M. Mayeda, Judge. Affirmed.

Contreras & Campa, Drago Campa and Vladimir Sigur for Appellant.

Law Offices of Rita Nalio, Rita Nalio; Law Offices of Ehsan Afaghi and Ehsan Afaghi for Respondent.

Noriega Chiropractic Clinics (Noriega) sued Liza Rita Nalio (Nalio) alleging failure to pay the costs of medical services rendered to Alfonso Toledo in connection with a previously litigated personal injury claim. Noriega claimed that Nalio, Toledo's lawyer in that underlying litigation, failed to comply with the terms of the lien signed to obtain treatment for the injuries that were the subject of that litigation. Nalio cross-complained for declaratory relief, asserting that the lien had been satisfied and that there was no basis for the recovery of attorney's fees in connection with the lien. Noriega filed a special motion to strike under Code of Civil Procedure section 425.16; the trial court denied the motion. We affirm.

PROCEEDINGS BELOW

Alfonso Toledo sought medical treatment from Noriega in connection with a personal injury claim. Toledo and his lawyer, Nalio, signed a medical lien for that treatment, providing for payment from any recovery in the litigation. After the claim was settled, Nalio disbursed a portion of the proceeds to Noriega, but Noriega thereafter filed this litigation claiming that the lien had not been satisfied. Nalio filed her cross-complaint, seeking a declaration as to the rights and duties of the parties as to further payments on the lien and the payment of attorney's fees and costs under the lien.

Noriega thereafter filed a special motion to strike under Code of Civil Procedure section 425.16 on October 11, 2002. The court denied the motion on November 27, 2002. Noriega timely appealed.

DISCUSSION

Code of Civil Procedure section 425.16, subdivision (e) provides an “act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative,

executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

On appeal, we independently review whether section 425.16¹ applies to a particular cause of action and whether the plaintiff has shown a probability he will prevail on the cause of action. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) This requires a two-step review, examining first whether the moving party has shown that the challenged cause of action arises out of acts in furtherance of the rights of free speech or petition, and, if so, whether the respondent has demonstrated the probability that he will prevail. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

With respect to the first prong, Noriega asserts that Code of Civil Procedure section 425.16 applies to the cross-complaint because it would not have been filed but for his filing of the complaint, which is itself a protected act under the statute. While his filing is protected, his argument proves too much. Not every act relating to litigation falls within the statute. (See *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, petn. for review pending, petn filed 1-27-04.) While the court may strike a cross-complaint in accordance with the statute, it may do so only if the claims asserted arise from an act in furtherance of the right of free speech or petition. “[T]he mere fact an action was filed after protected activity took place[, however,] does not mean it arose from that activity.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.)

In *Cotati*, the Court held that the SLAPP statute did not apply to “a municipality’s state court action for declaratory relief respecting the constitutionality of a mobilehome park rent stabilization ordinance, filed in response to a federal court declaratory relief

¹ All statutory references are to the Code of Civil Procedure.

action brought by park owners respecting the same ordinance.” (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 71.) The second action arose from an actual controversy between the parties; there, as here, the same controversy that formed the basis of the prior action. Because the second action did not seek adjudication based on the filing of the first action, but was instead based on the controversy between the parties that led to the filing of that action, it did not arise from protected activity. (See also *Kajima Engineering & Constructions, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921.)

In *Navelier v. Sletten* (2002) 29 Cal.4th 82, the Supreme Court considered whether a state court action filed after an unrelated federal proceeding met the “arising from” requirement of section 425.16. The defendant in the first action negotiated a release, and then filed counterclaims seeking damages relating to that action. Plaintiffs in the federal action then filed suit in state court, asserting fraud in the negotiation of the release, and breach of contract based on the counterclaims filed in the federal action. Defendant Sletten filed a special motion to strike under the statute. The Supreme Court held that the state court action did arise from the right to petition, finding that Sletten was “being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and Sletten’s alleged actions taken in connection with that litigation, plaintiff’s present claims would have no basis.” 29 Cal.4th at page 90. Unlike *Cotati*, the second lawsuit did not arise from the dispute that led to the filing of the first action, but rather from events related to that first action itself.

In contrast, here Nalio seeks a declaration of rights as to the controversy that is the subject of Noriega’s complaint; both the complaint and the cross-complaint require the trial court to determine the scope and effect of the medical lien at issue. The pleadings in this case demonstrate that there is an actual dispute between the parties as to the terms of the lien and its current status. Nalio seeks nothing more than a resolution of that dispute. Unlike *Navelier*, Nalio seeks no damages and does not assert that the execution of the lien or the attempt to enforce it gives rise to a claim for damages.

Like *Cotati*, there is only one controversy here. Noriega has therefore failed to meet his burden under the first prong of the required analysis. The trial court properly did not require Nalio to demonstrate a probability of prevailing on her claim.

DISPOSITION

The judgment of the trial court is affirmed. Nalio is to recover her costs on appeal.

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ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.